

# **The Jurisprudential Foundation of Law, Especially International Law: the Basis for True Progress & Reform**

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**Jurisprudential Underpinnings of Law, Especially International Law: the Basis for  
True Progress & Reform**

**Abstract**

This essay makes a unique case for the existence of justice, higher law and virtue by drawing on classic thinkers from both East and West. It asserts that no better jurisprudential foundation can be found. The need for this foundation emerges more clearly in the international context, but it applies to all legal systems.

After introducing the topic, explaining the relevance of this jurisprudence, responding to objections, and critiquing competing approaches, this essay presents pertinent sources from the East. Well-regarded in the East but less known to the West, writers such as Mencius, Tao, Hsuntze, and the Neo Confucianists from Chu Hsi present indicators of this jurisprudential foundation.

Subsequently, this essay focuses on the Pre-Socratics, Socrates, Plato and Aristotle—among the most important and influential thinkers in Western civilization. Their contributions carry tremendous implications for a sound jurisprudence.

As the footnotes indicate, a broad-ranging interdisciplinary interplay takes place with literary, historical, philosophical, legal, and other sources. This blend drinks deeply from profound wells of wisdom and insight. It synthesizes contributions emerging from a diversity of cultures, time periods, disciplines, geographic venues, and other traits: it rewards broad and open-minded engagement.

This essay seeks to blaze a trail overgrown and obscured by the presently in-vogue approaches. This confluence of great thinkers from East and West together provide weighty evidence that justice, higher law and virtue deserve to emerge from their eclipse over the past century to the present: this essay seeks to make this case.

## **Introduction**

Notwithstanding current, postmodern<sup>1</sup> wariness regarding universal, objective norms, an immutable and perennial jurisprudence of international law<sup>2</sup> must hold true for all people everywhere. If it is not for all people everywhere, how truly and rightfully "international" or "transnational" would it be?<sup>3</sup>

Stale legal thinking stuck in a relativistic and closed positivism<sup>4</sup> lags behind the renewal of scholarship in philosophy and segments of the social sciences that increasingly recognize the realities of justice<sup>5</sup>, virtue<sup>6</sup> and a higher standard, sometimes

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<sup>1</sup> See GENE EDWARD VEITH, POSTMODERN TIMES (1994), for a trenchant evaluation of postmodernism. Richard Rorty goes so far as to call this culture, sadly enough, "post-metaphysical" in RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY intro. and ch. 1 (1989). Rorty's term and work, taken descriptively, accurately takes the pulse of the culture, but does not provide the best prescription for the malady.

<sup>2</sup> Anthony D'Amato, in a personal conversation at Northwestern University School of Law (Spring 2001). Judd and Mary Morris Leighton Professor of Law Professor Anthony D'Amato asserted the idea that jurisprudence serves as the proper foundation of international law. This foundation presently remains visible, but perhaps more subtly so in its applicability to law in general.

<sup>3</sup> The father of international law, Hugo Grotius, wrote prodigiously on higher law and justice *vis a vis* international law See, e.g., HUGO GROTIUS, DE IURE PRAEDAE: COMMENTARY ON THE LAW OF PRIZE AND BOOTY (London, G. Cumberlege, 1950)(1604); HUGO GROTIUS, ON THE RIGHTS OF WAR AND PEACE (trans. William Whewell, London, John W. Parker, 1853).

<sup>4</sup> See, e.g., JOHN AUSTIN, LECTURES ON JURISPRUDENCE (5th ed., New York, 1985) (1885); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Cambridge, 1995); JOHN CHIPMAN GRAY, NATURE AND SOURCES OF THE LAW (1909); HANS Kelsen, GENERAL THEORY OF LAW AND STATE (1945); HANS Kelsen, THE PURE THEORY OF LAW (trans. Max Knight, 1967) (1924). Kelsen and Austin are both deemed leading proponents of legal positivism; although not as easily recognized as such, Gray also qualifies as a type of legal positivist of a different mold from Kelsen and Austin.

<sup>5</sup> See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS, ch. 7, 12 (1980); chapter 7 of "Justice" of ANTHONY D'AMATO'S, ANALYTIC JURISPRUDENCE ANTHOLOGY 249-289 (1996), which devote themselves entirely to discussing justice.

called higher law.<sup>7</sup> The reputation of the legal profession and the quality of legal systems hinge on what sort of response issues forth: whether the legal world joins in the renewal found in other disciplines, or whether it stays in stodgy ruts.

Justice, higher law and virtue are the best foundation of any legal system and the practitioners thereof. Its need and desirability is only more pronounced when it comes to the international realm. It is the search for the uniting, universal umbrellas built into the very fabric of the universe as well as the common ground of humanity across cultures. Put another way, this essay proposes the unifying theory of jurisprudence, which I contend provides the best basis for law and legal systems worldwide. Anything less than this common denominator would prove itself unfit as the groundwork for international legal regimes, where cultures of member states can vary considerably.

The current Yale Law School Dean Harold Koh writes:

During the classical period of international law, the causal question of why nations obey was generally conflated with the normative question of why they *should* obey, which was in turn usually answered by 'semi-theological' reference to the 'higher law'—the 'law of nature,' of which international law was but a part. Before the Roman empire, religion served as the paramount source of the law of nations. In Roman law, Gaius defined *jus gentium* in terms of "law 'common to all men.'" The Preface to Justinian's *Institutes*, published in 533 A.D., began with observations about the relationship between the law of nations and natural law.... Nor did medieval legal scholars distinguish municipal from international law, instead viewing the law of nations, understood as *jus naturae et gentium*, as a universal law binding upon all mankind.... The law of nations was thought to embrace private as well as public, domestic as well as transborder transactions, and to encompass not simply the "law of states," such as rules relating to passports and ambassadors, but also the law between states and individuals...international and domestic law together

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<sup>6</sup> See for example, Notre Dame Professor ALASDAIR MACINTYRE, *AFTER VIRTUE* (Notre Dame, 1984); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (Univ. of Notre Dame Press, 1988) which critiques the exclusion of virtue or Boston College Professor PETER KREEFT, *BACK TO VIRTUE* (San Francisco, Ignatius Press, 1992), which brings back classical understandings of virtue.

<sup>7</sup> See EDWARD CORWIN, *THE "HIGHER LAW" BACKGROUND TO AMERICAN CONSTITUTIONAL LAW* (Cornell University Press, 1928) (First printed as Harvard Law Review Article, Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* 62 HARV. L. REV. 149, (1928)).

<sup>8</sup> Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599. 2604-5.

constituted a unified legal system, with domestic institutions acting as important interpreters and enforcers of international legal norms.<sup>8</sup> (citations omitted).

The pedigree of this perspective is extensive over millennia, and still today provides a foundation for international law especially, but also for law in general.

The Nazi holocaust starkly demonstrates the need for an international jurisprudence of higher law, virtue and justice. Atrocities were done "legally" at times under German law and at the command of German authorities.<sup>9</sup> In order for one outside of German society, such as the Nuremberg court, to decry these murders and other abuses, there had to be some basis independent of the positive<sup>10</sup> law of Germany.<sup>11</sup> There seems to be no better grounding than higher law and justice.<sup>12</sup>

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<sup>9</sup>The Hart-Fuller debate in the *Harvard Law Review* concerning the jurisprudential implications of the case of the grudge informer places the contrast between higher law and positivism in sharp relief. The reference for H.L.A. Hart's piece is 71 HARVARD LAW REVIEW 90, 616-20 (1958) while Lon F. Fuller's reply appears in 71 HARVARD LAW REVIEW 630, 648-57 (1958). See also, H.L.A. Hart 71 HARV. L. R. 90, 616-20 (1958), Lon F. Fuller 71 HARV. L. R. 630, 648-57 (1958). This case concerns a woman in Nazi Germany, pursuant to the Nazi Act of 1934, reporting insulting remarks about Hitler made by her husband as a pretext for getting rid of him. The husband receives a death sentence commuted to a military assignment at the front. Later, a West German court convicts her pursuant to the German Criminal Code of 1871 for illegally depriving a person of his freedom. Most notably, the court of appeal called the statute upon which the woman had used as her pretext "contrary to the sound conscience and sense of justice of all decent human beings."

<sup>10</sup> The Nazis used the positive pronouncements of Oliver Wendell Holmes ("Three generations of imbeciles are enough" *Buck v. Bell*, 274 U.S. 200, 207 (1927)) to justify the neutering of the mentally handicapped in Germany. Given Holmes' positivism as laid out in Oliver Wendell Holmes, *The Path of the Law* 10 HARV. L. REV. 457 (1897); Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918), there exists few resources in his jurisprudence to criticize such eugenic practices.

<sup>11</sup> The Nuremberg Trials marked the first instance in history where international war crimes were tried in a court. The Chief Prosecutor, U.S. Supreme Court Justice Robert Jackson, explicitly grounds the prosecution on higher law.

<sup>12</sup> If there does *not* exist an objective, just basis from which to say the Holocaust was wrong, would it not be intensely problematic then to try the Germans on an *ex post facto* basis in an unprecedented, international tribunal? On what basis was there legitimate, actual notice that the Germans who legally obeyed orders from legitimate authorities to gas their victims were guilty of a crime if not that these Germans also have the higher law and a sense of justice through conscience within them? Conscience is a beacon of the higher law and justice, and every person has a conscience. Granted, conscience can become dulled, seared, tainted or skewed, but it does exist in every human being, a classic notion accepted by most of Western Civilization during the past two millennia.

Cicero, for example, posited a higher law, virtue and justice position. Among many passages, Cicero wrote:

But if Justice is conformity to written laws and national customs, and if, as the same persons claim, everything is to be tested by the standard of utility, then anyone who thinks it will be profitable to him will, if he is able, disregard and violate the laws. It follows that Justice does not exist at all, if it does not exist in Nature, and if that form of it which is based on utility can be overthrown by that very utility itself. And if Nature is not to be considered the foundation of Justice, that will mean the destruction [of the virtues on which human society depends]. For where then will there be a place for generosity...<sup>13</sup>

Thus Cicero, widely hailed as the greatest legal mind of his time, directly repudiates legal positivism and selfish utilitarianism, and vouches for higher law, virtue and justice, the soundest basis for law, including international law.

This essay does not attempt to delineate and demarcate all the contours of higher law, virtue and justice: such a task extends beyond the scope of this essay. It merely seeks to establish the existence of higher law, virtue and justice so that those who had categorically excluded such notions (especially those who have done so without much thought) would at least have the opportunity to consider or reconsider these notions.

This jurisprudential view does not belong exclusively to any political party or government: it remains the common inheritance of all humans everywhere. It refuses to wear the Emperor's new clothes<sup>14</sup> particular to every age and place.

Intentionally, I do not focus on applying the foundation herein to particular legal, political or social issues<sup>15</sup> (except, at most, in passing or as a brief example) lest the reader's position in one direction or another obfuscate the desirability of this framework in general. Also, a foundation does not form an entire edifice, and certain portions of the

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<sup>13</sup> CICERO, LAWS §§ I, XV (New York, Cambridge Univ. Press, 1999).

<sup>14</sup> A reference to the well-known Hans Christian Anderson story of an Emperor who is cleverly persuaded to wear undergarments with nothing else on top of them in public due to being persuaded that it is in vogue.

<sup>15</sup> For such application to various issues and policies, *see* NATURAL LAW AND CONTEMPORARY PUBLIC POLICY (ed. David F. Forte, 1998).

edifice would more directly touch on the foundation than others. Similarly, one can similarly analyze where this jurisprudential foundation touches more directly or less directly on variegated aspects of the entire edifice of law.<sup>16</sup> However, such analysis also largely lies outside the scope of this essay.

Though higher law can be used as a pretext for assorted forms of mischief, its abuse should not lead to a denial of its existence. Indeed, these ideas of virtue, justice and higher law themselves would seek to bring a corrective on such abuse. This essay simply tries to point to the existence and helpfulness of higher law, virtue and justice employed correctly rather than abused, so that at least a few more glimmers may emerge from its relative eclipse in both modern and postmodern legal scholarship.<sup>17</sup>

## Relevance

The most important and foundational relevance for this framework is that it proposes the unifying, universal foundation of jurisprudence, which itself is the proper foundation for law. Such relevance comes out more strikingly in international law<sup>18</sup>, which cuts across national cultures. To state it in a different way, not a single facet of law can live completely independent of justice, virtue, and higher law--and flourish in good health.<sup>19</sup> The convocation of sources in this essay primarily seeks to establish the

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<sup>16</sup> For example, this paper would have more direct relevance to the common law idea of *malum in se* than *malum prohibitum* in criminal law. Another example would be the differing notions of viciousness (as opposed to virtue) found in differing *mens rea* with their proportionately differing punishments in criminal law. The relegation of this example to a footnote perhaps helps accentuate the point that how the specific applications of this jurisprudential foundation would fall to other writings besides this one.

<sup>17</sup> See Peter Kreeft, *The Eclipse of Permanent Things*, PHILOSOPHY QUARTERLY (Fall 1991).

<sup>18</sup> This relevance emerges time and again for this legal academic, who has taught courses such as Public International Law, International Organizations, and Human Rights.

<sup>19</sup> For example, even a seemingly unrelated legal provision, such as stop signs at a crowded intersection, still has virtuous and just goals—as well as principles touching on higher law. Trying to prevent injury or death to innocent human beings would be one; the benefits of order instead of chaos or anarchy constitutes another; fairness is implicated in that the first to arrive has right of way; recklessly rushing through a stop



existence of justice, virtue and higher law, which can serve as an efficacious filter and a perspicuous lens through which to interpret, analyze, synthesize and critique especially transnational and international law, but also positive law as a whole.

The widespread convergence of this recognition from some of the most enduring thinkers from both the East and the West,<sup>20</sup> which I trace below, gives tremendous credibility to the common reality and truths that they present. Taken as a group, they do not speak from the same cultural, temporal and professional prejudices, biases, and patches of ignorance particular to any specific slice of society.<sup>21</sup>

If such truth is immutable, how recently these people acknowledged these realities is, in fact, irrelevant. If anything, they help to assure us that they are not speaking from the same cultural, temporal and professional prejudices, biases, provincialities and patches of ignorance particular to any specific group, including 21st century legal scholars.<sup>22</sup>

The present legal academic world regularly celebrates some of the dimensions of justice, virtue and higher law, even if these ideals sometimes fall under different rubrics. After all, cases such as *Brown v. Board of Education* clearly did not follow the existing line of positive law or certain elements of then current, broader culture of its time, but is widely celebrated today as a paragon of justice and higher law--a case virtuously brought and decided. A consistent positivist or formalist would strain to justify such a decision.

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sign without stopping and causing an accident would violate the virtue of prudence—to mention a few ways.

<sup>20</sup>For examples, authors Mencius, Mo Tzu, Plato, Aristotle and others who will be discussed below.

<sup>21</sup> It can broaden us beyond our particular time and place with its myopic focus on the recent, and provide needed correctives. Chronological, geographical, ethnic or other types of snobbery or narrowness have no place in the Academy, jurisprudence, law, or anywhere else for that matter. Therefore, what these classic Western and Eastern sources say should not receive summary dismissal by anyone. See Oxford and Cambridge professor's work: C.S. Lewis *Introduction* to ATHANASIUS, *DE INCARNATIONE* (1945). See also C.S. LEWIS, *THE ABOLITION OF MAN*, which some consider the best book of the 20th Century on this topic.

<sup>22</sup> See *Id.*

The existence of transcultural truth and reality is relevant anywhere and everywhere and forms, where necessary, the basis for legal reform.<sup>23</sup>

Psychiatry and Law professor Dr. Alexander Obolsky talked about how he knew he was not having an auditory hallucination, which he momentarily thought he was having when hearing what he thought was a Serbian band playing outside his office here in the United States.<sup>24</sup> He did so by confirming it with a person of good hearing (and presumably at least, not suffering from auditory hallucinations herself) present with him at that time.

Similarly, we find massive corroboration in these virtuoso thinkers and writers, presumably of sound (even outstanding) intellect and sense of justice themselves. Therefore, what these classic Western and Eastern sources say should not receive deprecation or lightly be ignored or dismissed by anyone. Indeed, the more erudite that one is, the more likely that one would have a familiarity with such major thinkers. This essay mines from major veins, although in the case of the Eastern sources, they are little known or appreciated in the West.

Basic metaphysical questions not only are addressed by, but also arise from, an essay along these lines.<sup>25</sup> However, a few that may be raised will be singled out for treatment hereinafter to clear some of the detritus that can obscure the view of justice, higher law and virtue, realities with which we must all reckon.

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<sup>23</sup> One need only look at whatever legal reform movement that one champions in order to realize that a relativistic positivism (law as it currently exists and finds enforcement by those with power) would foreclose the possibility of reform. If one touts the notion of "progress", such progress must be based upon some standard (higher law and justice at its best) towards which a society is progressing. To the extent a society violated justice, virtue and higher law, it would regress proportionately.

<sup>24</sup> Alexander Obolsky, Lecture in Law and Psychiatry at Northwestern University School of Law (Fall 1999).

<sup>25</sup> Questions of ontology, epistemology and ethics abound in this area and cannot possibly receive comprehensive treatment in a single essay of this length.

## **Relevant Objections and Other Challenges:**

### ***Epistemological Issues:***

To begin with, the scientific method (including empirical methodologies) has proven a fruitful and useful *modus operandi* for many things. It can be used productively, especially in the so-called natural sciences, but also in the so-called social sciences or humanities (including law) to a lesser extent. Some of the greatest gifts that the Enlightenment and modernism have bequeathed upon us come from knowledge garnered through the sound and rigorous application of these methods.

However, an epistemology that limits itself to scientific (including empirical methodologies) *alone* necessarily impoverishes itself and proves impractical, unwittingly self-contradictory or both. Let me expound briefly on each element of this assertion.

As the philosopher of science Del Ratzsch<sup>26</sup>, the leading philosopher Arthur F. Holmes<sup>27</sup>, as well as other contemporaries (and historical sources as well) point out, even so-called “neutral” applications of scientific methodologies necessarily predicate themselves on principles unproveable solely by scientific methodologies themselves.<sup>28</sup> Otherwise, it becomes tautological, self-contradictory, or at best, begs the questions: why exalt scientific methodologies above all others? Why exclude other methodologies and frameworks?

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<sup>26</sup> DELVIN RATZSCH, *SCIENCE & ITS LIMITS: THE NATURAL SCIENCES IN CHRISTIAN PERSPECTIVE* (2000).

<sup>27</sup> *See, e.g.,* ARTHUR HOLMES, *ETHICS* (1984).

<sup>28</sup> For example, assumptions of science unproveable by science include: a) that the senses (sometimes with instrumental aid) can access reality; b) that the human mind can then inductively ascertain truths from what the senses apprehended; c) that there exist knowable truths about the reality of the physical world.

One may respond, because it works. But then why are pragmatic, practical or utilitarian considerations deemed foundational by some?<sup>29</sup> Furthermore, pragmatic or utilitarian<sup>30</sup> considerations, rationales or justifications do not necessarily *a priori* exclude other methodologies and frameworks.

Another may say, because it comports with reality and facts. Herein lies a better response but one that also contains some untenable dichotomies. Since knowledge (including the scientific kind) should accord with truth, which conforms to reality, scientific methods can provide valuable tools.

However, they are not the only tools that can access objective reality. As a matter of fact, just and virtuous realities are not best established by scientific methodologies. Just as scientific methodologies function through direct sensory or instrumental apprehension, the work of a healthy conscience,<sup>31</sup> especially well-cultivated and developed, can directly apprehend just and virtuous realities comporting with higher law better than the best scanning electron microscope. Excruciating torture of a child for no other reason than the sadism of the torturers is readily apprehended by all of even half-decent conscience as being evil.<sup>32</sup> It is possible, however, for a conscience to be clouded, seared, calloused or twisted, just as different physical pathologies can hinder proper functioning of the body. The acknowledgment of conscience, which can apprehend

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<sup>29</sup> EDWARD S. CORWIN, *supra* note 7, 4-5. Note as well that these philosophies cannot justify themselves by themselves. Otherwise, they are reduced to tautologies.

<sup>30</sup> Whether of the variety advocated by Jeremy Bentham or John Stuart Mill. See JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (New York, Columbia Univ. Press, 1945); JOHN STUART MILL, UTILITARIANISM (Indianapolis, Hacket Publishing, 1979)(1863).

<sup>31</sup> See J. BUDZISZEWSKI, THE REVENGE OF CONSCIENCE (1999).

<sup>32</sup> So this counterexample refutes utilitarian calculus: to put it another way, if you have a large enough crowd of sadists torturing an innocent child deriving massive amounts of pleasure that exceed the pain of the lone child, then it should be allowable under utilitarianism since the total pleasure outweighs the total pain. That such an approach is morally reprehensible is readily apparent to those with even a half-functioning conscience. Thus, such actions are correctly deemed unconscionable—violative of justice, virtue and higher law.

justice, higher law, and virtue, should be no more impugned than the existence of mitochondria or DNA.

***The Basis for This Basis:***

A healthy conscience is the standard by which one judges normal (in the moral sense). That is why in Anglo-American criminal law, ignorance of the law is generally no excuse. In other words, the conscience engraved into a person, regardless of whether the person never even heard of the handiwork of the legislatures, judiciaries or executives, should have prevented the crime from occurring. There are various higher law theories, which are the main streams of the common-law tradition historically,<sup>33</sup> that establish this point.<sup>34</sup>

Some would claim that justice is simply defined socially. Such a stance undermines individual responsibility.<sup>35</sup> For a physician at Ravensbruck or Auschwitz to *refuse* to perform crude experimentation on unwilling patients that severely injures and eventually kills the concentration camp prisoner would be to exercise virtue in accordance with justice and the higher law—a law higher than Nazi dictates, no matter

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<sup>33</sup> See DR. ROBERT D. STACEY, *SIR WILLIAM BLACKSTONE AND THE COMMON LAW* (1989). In Anglo-American history, Blackstone's writings constituted a standard part of legal education. His works formerly graced the desks of law offices throughout the U.S. and England.

<sup>34</sup> The present McCormick Chair at Princeton Robert George writes cogently from this school of thought in several works. See, e.g., ROBERT GEORGE, *CLASH OF ORTHODOXIES* (2001); ROBERT GEORGE, *IN DEFENSE OF NATURAL LAW* (1999); ROBERT GEORGE, *NATURAL LAW AND MORAL INQUIRY* (1996).

<sup>35</sup> For a physician at Ravensbruck or Auschwitz to *refuse* to perform crude experimentation on unwilling patients that severely injures and eventually kills the prisoner would be to exercise virtue in accordance with moral reality and the higher law—a law *higher* than Nazi dictates, no matter how legitimate the government or military source.

<sup>36</sup> See for example the Nuremberg Code.

<sup>37</sup> Long-time Harvard University Professor Lawrence Kohlberg deems this level of moral development to be the highest of the six that he proposes. See LAWRENCE KOHLBERG, *THE DEVELOPMENT OF MODES OF MORAL THINKING AND CHOICE IN THE YEARS 10 TO 16* (1958); LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT : MORAL STAGES AND THE IDEA OF JUSTICE* (1st ed., 1981).

how legitimate or exalted the government or military source within German society. Nazi judges who refused to condemn innocent people in spite of formalistic or positivistic pressures<sup>36</sup> (such as the Nuremberg Code) would be exercising virtue in accordance with justice and the higher law.<sup>37</sup> If such virtue, justice and higher law did not exist, on what basis could one critique, redress, or reform atrocities done during the Holocaust, the former Yugoslavia, Rwanda, or East Timor—not to even start mentioning the Western Hemisphere?<sup>38</sup>

This view necessarily undermines various forms of determinism<sup>39</sup> (biological, social, etc.), which seek to eliminate the existence of volition and responsibility.<sup>40</sup> Such determinisms presumably attract their adherents by thus eradicating culpability, a convenient (but incorrect) way to deal with guilt and shame. It should be noted that removing culpability negates responsibility, which pushes towards anarchy, anomie<sup>41</sup> and antinomianism,<sup>42</sup> conditions that adherence to virtue, justice and higher law prevents.

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<sup>38</sup> Other examples of international infamy along these lines include the former Yugoslavia and Rwanda (for which the U.N. established special tribunals) East Timor (for which a separate country was recently formed) Colombia and Peru (which often have come under the judgment of both the Inter-American Commission of Human Rights as well as the Inter-American Court of Human Rights).

<sup>39</sup> See the philosophy of science works of Oxford Professor Alister McGrath, who holds a Ph.D. in microbiology.

<sup>40</sup> FYODOR DOSTOEVSKY, *NOTES FROM UNDERGROUND* (trans. Mirra Ginsburg, 1974). Dostoevsky satirizes rationalistic, empirical determinism extensively--but to provide one sampling: ".... so that everything that is done by man isn't in the least a matter of his own will, but happens of itself.... then man will no longer be answerable for his actions, and life will become exceedingly easy. All human actions will, of course, be classified according to these laws—mathematically, like a logarithm table, up to 108,000—and entered in a special almanac. Or, still better, certain edifying volumes will be published, similar to our encyclopedic dictionaries, in which everything will be calculated and designated with such precision that there will no longer be any actions or adventures in the world."

<sup>41</sup> The term is used particularly in the sociological sense as employed by scholars such as Emile Durkheim.

<sup>42</sup> A term indicating lawlessness—not a condition favorable to the existence of legal systems, institutions or legal professionals to say the least.

A common (but irresponsible) escape attempt is an agnostic skepticism, which is a position in and of itself. If seeking logical consistency, why not be skeptical and/or agnostic about skepticism and agnosticism themselves?<sup>43</sup>

Another error lies in embracing contradictory, relativistic pluralism.<sup>44</sup> While recognizing the common ground often existent between various worldviews, it plainly violates the law of non-contradiction if it holds to mutually exclusive claims. An objective standard of justice exists; an objective standard of justice does not exist: both statements cannot be true and concomitantly comport with reality.

This does not impugn true paradoxes or antinomies, which only *seem* to contradict, but do not in actuality.<sup>45</sup> Rather, I am talking about clear-cut *A* and *not A* instances that cannot both be true according to this basic axiom of logic, philosophy and mathematics—which also correspond with reality. To give another example, a person does not both have biological children and *not* have biological children at the same time in any unified, literal sense. To say otherwise would fly in the face of common sense.

So as the leading Hindu philosopher Ramakrishna even acknowledged, epistemological arms that embrace all views lead to self-strangulation.<sup>46</sup> The open mind,

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<sup>43</sup> No one could function with a thoroughgoing skepticism or agnosticism. If I did not firmly believe in the existence of this computer on which I am typing this essay or this Law Review member who (presumably) will read it, I would not be typing it right now. If I did not believe in the existence of the chair I am sitting on, I would not attempt to sit on it for the many hours I have in preparing this paper. So even functionally, thoroughgoing skepticism and agnosticism fail. So I am skeptical of the soundness of skepticism and *not* agnostic about existing pitfalls in agnosticism. Most honest and sensible people could not correctly claim to hold a thoroughgoing skepticism or agnosticism: those who do, paralyze themselves.

<sup>44</sup> See the works of the British author Lesslie Newbigin, which provide a sound treatment of pluralism. For example, see LESSLIE NEWBIGIN, *TRUTH TO TELL* (1991).

<sup>45</sup> For example, I do not presently deny such paradoxes as the wave/particle duality of light, or the way certain sub-atomic particles seem to behave, or elements of both genders existing in hermaphrodites, the Trinity, or all three states (water vapor, liquid water and solid ice) of H<sub>2</sub>O existing at the triple point.

<sup>46</sup> As the leading Hindu philosopher Ramakrishna even acknowledged. See, e.g., RAMAKRISHNA, BHABANAYA YUGAPURUSHA KESABACANDRA O BHABE SRISRIRAMAKRSHNA (1980); RAMAKRISHNA, BHAKTIPRASANGA (1962); RAMAKRISHNA, GITATATTVE SRIRAMAKRSHNA (1969).

like the open mouth, said G.K. Chesterton, is intended to close down upon something.<sup>47</sup>

That something includes the truths of justice, virtue and higher law that accord with the highest design of human nature.<sup>48</sup> This position does not contradict the law of non-contradiction. It is cohesive and comports with objective reality.

### ***Lesser Alternatives***

It was recognized historically that the common law permits for corrections of errors.<sup>49</sup> Formalistic or positivistic cowardice should not prevent those with authority to modify positive law from abandoning unjust ruts.<sup>50</sup> Thus, we should not believe that human lawmakers or adjudicators or executors are so constrained to maintain unjust laws--unless (s)he is binding her(him)self with formalist/positivistic shackles.<sup>51</sup>

Rabelais satirizes the formalist in Gargantua & Pantagruel.<sup>52</sup> The judge has an elaborate array of formalities and procedures—but in the end decides to make the

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<sup>47</sup> This epigram comes from the British author G.K. Chesterton. *See, e.g.*, G.K. CHESTERTON, ALL IS GRIST: A BOOK OF ESSAYS (1931); G.K. CHESTERTON, ALL THINGS CONSIDERED (1913); G.K. CHESTERTON, AS I WAS SAYING (1966).

<sup>48</sup> See for example the American Declaration of Human Rights, (Feb. 15th, 2005) at [http://www.hrcr.org/docs/American\\_Convention](http://www.hrcr.org/docs/American_Convention), which bases its pronouncements on this premise.

<sup>49</sup> See JEFFREY BRAUCH, IS COMMON LAW HIGHER LAW? (1999).

<sup>50</sup> See ANTHONY D'AMATO, JURISPRUDENCE (1984).

<sup>51</sup> The doctrine of *stare decisis* or custom should not be exalted over justice. The common law does not advocate such a stance and international law should not embrace it. Yet such a stance is not rare *de facto*. Instead, virtue, justice and higher law should reign above slavish devotion to *stare decisis* or custom. For a contemporary example, see *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), which states: "Stare decisis is not an inexorable command; rather it 'is a principle of policy and not a mechanical formula of adherence to the latest decision' (citation omitted). *See also* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 87 (2001), which connects stare decisis with positivism: "The American commitment to stare decisis gradually strengthened during the nineteenth century, due mainly to the emergence of reliable law reports and a positivist conception of law." and a contrasting quote of Lord Mansfield *contra* Blackstone in *Id.* at 71: "[P]recedent, though it be Evidence of law, is not Law itself, much less the whole of the Law." Eschewing an overly rigid application of *stare decisis* allows the overturning of cases such as *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>52</sup> RABELAIS, GARGANTUA & PANTAGRUEL 440-441 (trans. Jacques Le Clerq, New York, Random House, 1963). "First I view and review, read and re-read, ponder, weigh, thumb and digest the bills of complaint, subpoenas, appearances by proxy, reports of hearings, investigations, instruments of deposition, petitions, articles of evidence, allegations, rejoinders, rebuttals, requests, inquests, surrejoinders, surrebuttals,



decision randomly. This satire implies that procedural integrity is not sufficient to ensure substantive justice. Substantive justice, as the dominant goal, should rather be served by fair procedures.<sup>53</sup>

The fictional Justice Keen is a prototypical positivist.<sup>54</sup> He adopts a false dichotomy that is often drawn between facts and values.<sup>55</sup> According to this position, facts are public and objective while values are only private and presumably subjective.<sup>56</sup> If higher law and justice do in fact exist, why should they find themselves relegated to private life alone?<sup>57</sup> Such a view leads to hypocrisy, undermining the integrity of the unitary, whole person in society.<sup>58</sup>

So the question stares us in the face, does international law (and other law) have its basis in higher law and justice? Or is it nothing more than a product of the politics of professionals, politicians, diplomats and other power brokers (which may or may not have a firm, objective basis), who alone have sovereignty to decide the norms and structures?<sup>59</sup>

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confirmation of former testimony, acts, writs, bulls, exceptions taken, grievances, objections, counter-objections . . . I decided in favor of the party who won at the judiciary, tribonian and praetorial throw of the dice.”

<sup>53</sup> Attorneys and judges sometimes look for procedural pretexts to advance substantive concerns.

<sup>54</sup> Harvard Law Professor Lon Fuller’s Lon Fuller, *Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949), makes each of the fictional judges prototypical of a school of jurisprudential thought.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See Newbiggin, *supra* note 47.

<sup>58</sup> See *passim* in the book VIRTUE: CONTEMPORARY ESSAYS ON MORAL CHARACTER (eds. Robert C. Roberts & Robert B. Kruschwitz 1987) for excellent contributions on this point. It impoverishes public life and leads to the double lives of those who put on the façade of a public *persona* that masks an execrable life outside the public eye. Those in the legal/political realm cannot excuse themselves from this in saying that though they consider something an injustice as a “private citizen”, we must mechanically maintain the present law in their public capacities when it is manifestly unjust albeit politically inexpedient for their own self-interested considerations. While failure is common, it should not deny the goal of a virtuously integrated person, virtuous (including just) and moral in private as well as public life. Legislators, legal practitioners, judges and other professionals often have public dimensions to their lives that should be no less moral or virtuous than their private lives. This applies to the domestic realms, international spheres, as well as the interactions between the domestic and international systems.

For if there exists no justice or higher law, every reform, every critique would fall into the morass of merely subjective opinion. If all that exists is each person's subjective opinion, then there do not exist grounds from which one could say that one opinion is better than another. If not, then what permanent foundation would law then stand or should it progress towards? Remove the cleansing cascade of higher law, virtue and justice, then a raw, cynical calculus of so-called *Realpolitik* would remain like a crusted stain.

If objective bases in higher law and justice do not exist, then ideological and *Weltanschauung*<sup>60</sup> chaos, conflict and confusion follow. Epistemic despondence and narrowness then tend to rear their ugly heads. Rather than having no better grounds than the instability of relativism and/or uneasy but logically incompatible pluralism, many authors<sup>61</sup> aver a justice, virtue and higher law foundation for the super-structures of law. This convergence and confluence of great scholars, which will be treated below, bears witness that virtue, justice and higher law do in fact exist, independently of the vagaries of any mortal individual or group.<sup>62</sup> They serve as the best basis for law, especially international law.

When this reality is ignored and oppressive laws are allowed to reign, the results can be nothing short of catastrophic. Nazi Germany, Maoist China, and Stalinist Russia are but three 20<sup>th</sup>-century examples of totalitarian regimes that abused law as a weapon

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<sup>60</sup> See MACHIAVELLI, *THE PRINCE AND OTHER WRITINGS* (trans. Wayne Rebhorn, New York, Barnes and Noble Classics, 2003); Alexander Obolsky, Law & Psychiatry Lecture at Northwestern University School of Law (Fall 1999).

<sup>61</sup> The German term for worldview

<sup>62</sup> Various passages in Sophocle's *Antigone*, see SOPHOCLES, *THE OEDIPUS PLAYS OF SOPHOCLES*, (trans. Paul Roche, Mentor, 1958) [hereinafter *OEDIPUS PLAYS*], bring this point out lyrically.

for oppression and repression.<sup>63</sup> Mass executions, gulags, cruel human experimentation, and concentration camps resulted.<sup>64</sup>

As a positive contrast, and by way of contemporary introduction and treatment, it is fitting to include one shining example of courageous communication of these unpopular yet no less just realities: Nobel Laureate Aleksandr Isayevich Solzhenitsyn. Few (if any) people in the 20th century had more effectively borne eloquent witness to higher law, virtue and justice in reference to such horrendous regimes, especially the brutal oppression that Solzhenitsyn himself suffered. His writings and addresses give hope that the truth of sound virtue, justice and higher law can and will triumph over miswielded force.<sup>65</sup> In this way, Solzhenitsyn addresses the larger questions of law with its best metaphysical moorings. For these attainments, he has been heralded widely as a great voice in an ethical and legal wilderness.

These questions are often ignored to our peril. The accumulated experience and wise interpretation of history make it not too sweeping a statement to claim that all people in all places and times (contrary to socialized or other ethical relativisms) must heed justice, higher law and virtue in order to thrive, whether in domestic or in international spheres.

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<sup>63</sup>RANDALL L. BYTWERK, *BENDING SPINES : THE PROPAGANDAS OF NAZI GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC* (2004); RHOADS MURPHEY, *A HISTORY OF ASIA* 351-4, 379-382 (1992); Georgii Fedorovich, Trudy I. V. Stalina o iazykoznanii i voprosy istoricheskogo materializma (1951).

<sup>64</sup> While this response does not purport to provide a historical survey of the practices of such regimes, even a cursory scan would reveal that many such historical treatments have well-documented the inhumane and barbarous acts done in the name of (or at least with the permission of) law, including improper application or enforcement of decent laws that were violated. The primary documents in the Nuremberg trials are a case in point.

<sup>65</sup> As a singular contrast in the midst of the Soviet oppression, Nobel Laureate Aleksandr Isayevich Solzhenitsyn powerfully conveys the ideals of higher law. From his bombshell Commencement Address at Harvard University in 1978 to the Hoover Institute at Stanford University, from the Gulag Archipelago to The Calf and the Oak, Solzhenitsyn stunningly asseverates higher law. *See, e.g.,* ALEKSANDR ISAYEVICH SOLZHENITSYN, *THE CALF AND THE OAK* (1980); ALEKSANDR ISAYEVICH SOLZHENITSYN, *GULAG ARCHIPELAGO* (1<sup>st</sup> ed., New York, 1985); Aleksandr Isayevich Solzhenitsyn, Address at Harvard University (1978).

As we acknowledge such ethical virtuosos as Solzhenitsyn in our time, we can also remove ourselves from chronological snobbery and geographic provincialism in order to stand on the broad shoulders of giants from both East and West such as Mencius, Mo Tzu, Plato, Aristotle, and others to see further and more clearly than the constraints of ethical relativism or legal positivism/formalism would allow.<sup>66</sup> A truly international jurisprudence should be founded on that which is common to East and West for all time. The fixation with the recent and contemporary must make room for the wisdom of the ages, which does not change over the shifting sands of time.<sup>67</sup>

Helping to dig a truly transnational and international jurisprudential foundation towards a more widespread recognition of the existence of objective justice, higher law and virtue is an important foundation to consider before asking questions about any particular legal system, international or domestic alike. These first sections have introduced this topic, demonstrated its relevance, and addressed objections that exist to higher law, virtue and justice as a jurisprudential basis. This treatment now extends a constructive case with a view from the East as well as classical sources from the West.

### **A View From the East**

Classical Eastern philosophers, often ignored or given scant treatment in the West, have much to teach us about the necessity of adhering to justice and higher law in order for law and the *polis* to flourish, domestically or internationally. They write much

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<sup>66</sup> To borrow and modify a modest disclaimer by Sir Isaac Newton: "If I have seen further, it is because I have stood on the shoulders of giants."

<sup>67</sup> If international law (and other law) do not more fully regain their moorings in just reality, virtue and higher law, then we will reap much bitter fruit in the future of the world. Much positive law begging for conscientious objections may then increase.

of virtue, which merges with broader notions of justice—indeed justice itself is a classic, linchpin virtue. Virtue also always comports with the higher law. Let us delve into relevant portions of their jurisprudence in order to regain for ourselves a more adequate adherence to virtue, justice and higher law in law, most notably for transnational or international law.

Around 1122 BC, the Chou Empire conquered the Shang people. Instructions issued by a Chou ruler to one of his vassals said: “I will explain to you how virtue should control the use of punishments . . . Make your judgments justly and sincerely.”<sup>68</sup> Even a ruler of these marauding conquerors not only referred to, but also exhorted, the exercise of just judgments. Such just judgments surely rise above the arbitrary and capricious, the inconsistent and unfair. Justice grounded in the higher law is a prized virtue.

Mo Tzu, who was primarily raised on Confucianism, started his own school of thought, which was comparable to classical Confucianism. He said the following about the need for just administration of law and order for thriving, applicable to both the international and domestic arenas:

Nowadays all rulers wish their domains to be wealthy, their people to be numerous, and their administration to produce order. But in fact they obtain not wealth but poverty, not populousness but paucity of population, not order but chaos—thus they lose what they want and get what they abhor. What is the reason?

Mo Tzu said: It is because the rulers are unable to exalt the virtuous and to cause the capable to administer their governments. When virtuous officers are numerous in a state, it is well governed; when they are few, it is governed badly. Therefore it is the business of the rulers merely to cause the virtuous to be numerous. By what method can this be done?

Mo Tzu said: Suppose, for example, that one wishes to cause good archers and charioteers to be numerous. In this case one will certainly enrich them, give them rank, respect them, and laud them. Once these things are done, good archers and charioteers will become numerous. How much more should this be done in the case of the virtuous and excellent who are rich in virtuous conduct, versed in argumentation, and experienced in the arts of the Way. These are certainly the treasures of the nation and the supports of

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<sup>68</sup> THE SHE KING 396-7 (James Legge trans., London, 1875).

the state. They too must be enriched, given rank, respected, and lauded; once this is done, they too will be numerous.<sup>69</sup>

The passage quoted above outlines both the wisdom and method of instilling virtue (of which justice is a central one) and installing virtuous leaders.<sup>70</sup> Both results bring greater justice to a society and encourages greater adherence to higher law. Such objectives rise higher than a behaviorism<sup>71</sup> unattached to magnanimous ends, such as advancing the common good.

Mo Tzu apparently agreed with Confucius that the hereditary rulers should transfer the administration of their governments to men of virtue and capacity.<sup>72</sup> At its best, it should not reduce into a purely pragmatic, behaviorist or utilitarian calculus—although it can appear that way on its face and in its crasser forms, can reduce to such calculi.

### **Mencius:**

In the midst of a high-water mark for the popularity of Mo Tzu's way of thinking, the so-called "agricultural school" of Mencius emerged.<sup>73</sup> It maintained that "a wise and virtuous ruler tills the soil together with his people in order to get his food; along with governing, he cooks his own meals morning and night."<sup>74</sup> This notion has the principle

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<sup>69</sup> MOTSE, THE ETHICAL AND POLITICAL WORKS OF MOTSE 30-31 (Mei Yi-Pao trans., 1929).

<sup>70</sup> See Douglas W. Cassel, Jr., *Somoza's Revenge: A New Judge for the Inter-American Court of Human Rights*, 13 HUMAN RIGHTS LAW JOURNAL, No. 4, 137 (April 1992), on the debate surrounding the moral qualification for a justice on the Inter-American Court of Human Rights.

<sup>71</sup> See B.F. SKINNER, CONTINGENT REINFORCEMENT; A THEORETICAL ANALYSIS (1969); IVAN PAVLOV, EXPERIMENTAL PSYCHOLOGY, AND OTHER ESSAYS (1957).

<sup>72</sup> MOTSE *supra* note 68.

<sup>73</sup> Mencius' opinion foreshadows and antedates by millennia the views of this nation's founders such as Washington (who tilled the soil himself at Mount Vernon) and Jefferson (who had greater trust in the hard-working, ordinary agrarian than some of his oligarchic contemporaries had).

<sup>74</sup> THE FOUR BOOKS, 3 (2) 10 (trans. James Legge, China, Commercial Press, date unknown).

behind it that those who rule and judge should know the life of the people they rule and/or judge.

Apparently, Mencius followed the example of Confucius in a number of ways.<sup>75</sup> To the point at hand, Mencius also eloquently asserted the claim of the scholar and the man of virtue to a place of honor above that which is conferred by the pomp of princes. Such a man, expresses Mencius, should regard worldly success and failure with indifference, secure in the knowledge that, if his character is as it should be and the world fails to acclaim him, the fault lies not with himself but with the world.<sup>76</sup> That is the sort of virtue that is worthy of notice, and refreshing in an age of hype and celebrity production. Describing the just and virtuously great person, Mencius says:

Dwelling in the wide house of the world, occupying his correct place in the world, walking in the great way of the world; when his desire for office is fulfilled, practicing his principles along with others; when that desire is disappointed, practicing them alone; riches and honors cannot corrupt him, poverty and mean condition cannot change him, authority and power cannot make him bend the knee: such is the truly great man.<sup>77</sup>

Earlier, Confucius had told the rulers that they should transfer the administration of their governments to men of virtue, ability, and education,<sup>78</sup> which Mencius fully concurs with--as the previous quote partially describes.

“One who outrages the human virtues is called a brigand; one who transgresses against righteousness is called a ruffian. I have heard that the fellow called Chou was put to death, but I have not heard that this was killing a sovereign.”<sup>79</sup> said Mencius in regards

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<sup>75</sup> For example, he was quite as democratic as Confucius in accepting students regardless of their socioeconomic or political standing, demonstrating an unusually egalitarian educational ethic THE FOUR BOOKS *supra* note 73.

<sup>76</sup> *Id.* at (1) 9.

<sup>77</sup> *Id.* at 3 (2) 2.3. As we shall see later in this study, similar notions also occurred in prominent western thinkers. We need many more such great and just people, who not only reflect higher law in their jurisprudence, but their very lives.

<sup>78</sup> See CONFUCIUS, ANALECTS (trans. David Hinton, Washington D.C., Counterpoint, 1998); CONFUCIUS, ANALECTS (trans. Raymond Dawson, New York, Oxford Univ. Press, 1998).

<sup>79</sup> *Id.* at 1 (2) 8.

to the regicide of the last Shang ruler when asked about it by the king of Ch'i. Evidently then, Mencius placed just and virtuous character above brute power or position, even the position of king. For Mencius, might does not equal right, nor does positional authority by itself necessarily denote the exercise of justice. Hence, the basic postulate of Mencius' sociopolitical and legal program asserted that virtues such as justice, above all else, breed success in the most profound sense of the word.<sup>80</sup>

Mencius directly counters a representation on its face of one of Mo Tzu's principal arguments, viz. the necessity of something's utility or profitableness as bedrock. It could also be said to counter Western utilitarians such as John Stuart Mill<sup>81</sup> and Jeremy Bentham,<sup>82</sup> who rehash some of the same hackneyed utilitarianism much later in another part of the world.

The following passage also emphasizes the necessity to go beyond the narrowness of short-term, shortsighted personal utility and profitability. The book of *Mencius* begins:

Mencius had an interview with King Hui of Liang. The king said: 'Venerable sir, since you have considered it worth while to journey so far to come here, I assume that you must have brought with you counsels to profit my kingdom—is it not so?' Mencius replied, 'Why must your majesty speak of profit? I have nothing to offer but benevolence and righteousness. If your majesty asks, 'What will profit my kingdom?' then the great officers will ask, 'What will profit our families?' and the lower officers and the people will ask, 'What will profit our persons?' Superiors and inferiors will contend with one another for profit, and the state will be endangered.'<sup>83</sup>

Clearly, a simplistic profit seeking and utilitarian perspective fails to reach that just and virtuous height that Mencius advocates. Those who advance justice and higher law

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<sup>80</sup> The point here is not an advocacy of regicide or other killing of a judge or sovereign—by no means. It is again, dramatically underscoring the importance of justice and virtue in any legal and political system.

<sup>81</sup> JOHN STUART MILL *supra* note 30.

<sup>82</sup> JEREMY BENTHAM, *supra* note 30.

<sup>83</sup> THE FOUR BOOKS, *supra* note 73.



typically do not obsess about profit—and can indeed sacrifice in various ways for higher causes.<sup>84</sup>

Continuing this argument, Mencius points out that such a condition will put the king in the precarious position of losing his very life to a subordinate who covets his position and his wealth. “But,” he continues, “there has never been a benevolent man who neglected his parents, nor a righteous man who regarded his ruler lightly. Let your majesty then speak only of benevolence and righteousness. Why must you speak of profit?”<sup>85</sup> Such a stance undermines reductionistic “bottom line” pursuits of profit to the exclusion of virtue, an approach unworthy of the more exalted calling of justice and higher law.

As Confucius and Aristotle contended, Mencius claimed that the good is that which is most fully congruent with human nature.<sup>86</sup> However, the Legalists of China would contend that Mencius had an unduly optimistic view of human nature.<sup>87</sup> All of them however, agreed upon the necessity of actions in accordance with sound justice and other virtues, the necessity of higher law beyond brute force or sheer authority alone.

To return to Mencius, he vouched for “education” chiefly as a means to cultivate a good sense of justice in accordance with original human nature.<sup>88</sup> He observes, “That

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<sup>84</sup> For example, surveys have demonstrated that public interest attorneys at once both make the least income yet have the highest satisfaction in their work of any segment of the legal profession. They often make greater impacts for justice too.

<sup>85</sup> THE FOUR BOOKS, *supra* note 73.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Perhaps similar to Platonic “memory” or analogous to a pre-Fall state of Edenic innocence in the Judeo-Christian view *see Genesis* 1-3.

which differentiates men from the birds and beasts is very slight; ordinary men discard it, superior men preserve it.”<sup>89</sup>

## **Tao:**

Moving from Mencius to the Taoists, it is a basic principle of Taoism that one should be in harmony with, not in rebellion against, the foundational laws of the universe.<sup>90</sup> Such a tenet presupposes the existence of foundational laws of the universe, in other words, higher law.<sup>91</sup>

Living in accordance to the fundamental laws of the universe includes the conclusion for contemplative Taoism that one should maintain insouciance towards power, position, or honors in this world.<sup>92</sup> Taoist works speak of various sages who declined the offices of prime ministers and even did not seize the offer of thrones.<sup>93</sup> Thus, a Taoist living according to these ideals would live above the vainglory, conceit and arrogance that often accompany rulership in this life.

The Taoist position is much more susceptible to the critique of erring too far towards a phlegmatic, even at times irresponsible indifference to such matters. It also fails to provide a sufficient notion of stewardship, for example, of resources in its flight away from materialism. It almost crowns apathy as a virtue—if taken too far. It would be no virtue to be apathetic or phlegmatic to violations of international human rights, for

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<sup>89</sup> THE FOUR BOOKS, *supra* note 73 at 14 (2) 19.1. Mencius’ position implicitly endorses the proposition that one must always act justly and virtuously because everything one does will impact, for good or ill, the development of one’s own character. That statement would necessarily include everything that one does within the legal profession.

<sup>90</sup> THE FOUR BOOKS, *supra* note 73 at 14 (2) 19.1.

<sup>91</sup> U.S. legal scholars in the present period of history certainly do not hold such an assumption universally, which accentuates the need for its rediscovery.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

example, which call for upholding worldwide. Nonetheless, it still adheres to a form of the higher law.

### **Hsuntze:**

The philosopher Hsuntze also notes the self-interested proclivities of humans that Taoism apparently attempts to remedy.<sup>94</sup> Hsuntze's views contrast the Taoists in what he considers "natural" in that a Taoist considers becoming "natural" as the crux of the answer whereas Hsuntze sees our "natural" condition as problematic from birth.<sup>95</sup> He says:

Men are born with the love of gain; if this natural tendency is followed they are contentious and greedy, utterly lacking in courtesy and consideration for others. They are filled from birth with envy and hatred for others . . .

For this reason it is essential that men be transformed by teachers and laws . . .

But everything that can be learned and worked for is acquired character.<sup>96</sup>

This view not only serves as a counter-point to the views of Mencius, but it also impinges upon what some thinkers consider the motivating forces (*e.g., a la* Adam Smith<sup>97</sup> and other capitalists) and/or problems with capitalistic systems (*e.g.,* Karl Marx and Mao Tse-Tung). These systems, Hsuntze would likely say, beg for virtues of temperance, justice and content generosity through the fostering of character education and laws consonant with the higher law. Legal systems ideally work as safeguards against these self-interested tendencies of humanity.

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<sup>94</sup> XUNZI, THE WORKS OF HSUNTZE (Homer H. Dubs, trans, 1928).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See ADAM SMITH, THE WEALTH OF NATIONS 10 (ed. C.J. Bullock, P.F. Collier & Son, 1909).

To give another example, an extended but selective quote from Hsuntze elaborates on key elements of his vision of justice, especially in regard to virtuous contentment (not to be confused with a smug complacency) contrasted with disgruntled greed. The level of justice, virtue and accordance with higher law would increase with its application. It contrasts moral laxness versus morality, materialism versus satisfaction, anxiety vs. peace, and anhedonia vs. virtuous pleasure and happiness. It would accord well with Aristotle's notions of *arete* and *eudaimonia* (virtue and happiness).

Those who regard moral principles lightly always attach great importance to material things. And those who externally attach great importance to material things are always inwardly anxious. Those who act without regard for moral principles are always externally in a dangerous position. And such persons are always inwardly afraid.

When the heart is anxious and afraid the mouth may hold fine food, but it will not taste it; the ears may hear bells and drums, but they will not hear music . . . one may wear the most comfortable clothing . . . but his body will be oblivious of them. Even if all the pleasant things in the world were offered to one in this state, he could not be content. If someone were to ask him what he wanted, and give him everything he asked for, he would still be dissatisfied. And so, when every pleasant thing has been given him, sorrow is still abundant; and when all beneficial things have been added to them, harm is still plentiful . . .

. . . .

. . . Such persons, though they be...called rulers, are no different from common thieves. They may ride in carriages and wear caps of ceremony, but they are no better off than paupers. This is what is called making one's self a servant of material things.

When a man's mind is peaceful and happy, then even sights below the ordinary will satisfy the eye; even sounds below the ordinary will content the ear; coarse rice, vegetables, and soup will be enough for the mouth; clothing of coarse cloth and sandals made from rough cords will give comfort to the body; a hut of straw, with a mat on the floor and a battered stool to lean against, will suffice for the form.

Such a man, lacking all the fine things in the world, is yet happy; though he has neither power nor position, his name becomes known. If he were appointed to rule the empire, this would mean much for the empire, but it would make little difference in his peace of mind and contentment. This may indeed be...making material things one's servants.<sup>98</sup>

Such a passage can serve a salubrious purpose if more faithfully applied by those responsible for legal systems. Indeed, Hsuntze's description can also be a virtuous

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<sup>98</sup>J.J.L. DUYVENDAK, HSUN-TZU ON THE RECTIFICATION OF NAMES 252-3 (trans. T'oung Pao XXIII, Leiden, 1924).

prescription that falls within higher law and justice for societies and individuals everywhere.

### **Neo-Confucianists From Chu Hsi:**

We now move to one of the greatest if not the greatest of the Neo-Confucianists, Chu Hsi, whose interpretations of some of the classics were considered authoritative on the official government exams for almost 6 centuries from 1313 to 1905 (when the exams were abrogated in China). Speaking on the issue of the structure of justice and higher law built into the universe, he avers that “Principles or *li* are without birth and indestructible.”<sup>99</sup> Changeless, they are all part of the one great *li*, the Supreme Ultimate, which Chu Hsi equates at times with the *Tao*. Thus, Chu Hsi recognized justice and higher law, both equally applicable in the Western Hemisphere as they have been in the East.

Referring back to Mencius, another leading Neo-Confucianist Tai Chen states: “Those who anciently wished to exemplify illustrious virtue to the whole world, first ordered their own states . . . they first cultivated their own characters. Wishing to cultivate their characters, they first rectified their hearts.”<sup>100</sup> Chen helped revive the centrality of character development through virtue, a result that flows into and out of justice and the higher law.

Chen reinforces these notions by recognizing the place of “virtues as the sense of shame, humility, and the knowledge of right and wrong.”<sup>101</sup> Chen combines both emotivist and intellectual/cognitive dimensions in his conception of virtue. Chen was not

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<sup>99</sup> CHU HSI, *SSU SHU CHI CHI CHU*, TA HSUEH 5a (ed. Ssu Pu Pei Yao, 1905).

<sup>100</sup> THE GREAT LEARNING 357-58 (Shanghai, China, The Chinese Books Company, 1933).  
TAI CHEN, *MENTZU I SU CHENG* 2.7b-11a (1924).

a moral skeptic, who is often mired in the morass of doubt and despair in regards to the epistemology of ethics.

Perhaps his witnessing actual failures of justice, higher law and virtue helps explain why Yen Fu (1854-1921), who studied at the University of Edinburgh and translated Western philosophical works into Chinese, brought this scathing indictment after the first World War: “It seems to me that in three centuries of progress the people of the West have achieved four principles: to be selfish, to kill others, to have little integrity and to feel little shame.”<sup>102</sup> Coming from one who had formerly admired Western culture, Yen Fu’s words are sobering ones indeed. The four "principles" Fu describes would not lead to a harmonious international or domestic legal system, to say the least.

This survey identifies an Eastern pattern that recognizes the existence, and points to aspects of justice, higher law and virtue—whether indicated in "right living", *Li*, morality, *Tao*, or other comparable terms. This reality, whichever appellation one chooses to give it, forms the best foundation for law, especially international law, which must carve out the common inheritance of humanity in the midst of diverse cultures.

### **The Pre-Socratics, Plato and Aristotle on Justice, Higher Law and Virtue**

Turning now from Asia to classical Greece, let us inquire into the Pre-Socratic, the Platonic, and then the Aristotelian conceptions of justice, higher law, and virtue, which are necessary to maintain the health of jurisprudence and the law that flows from, and is applied by, legal bodies and systems.

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<sup>102</sup> HSUEH HENG, NO. 18 6-7 (1923).

## Pre-Socratics

An emphasis of the Pre-Socratics that stresses their continuity with the past is the idea of a law-governed universe.<sup>103</sup> Their explanations of the ordered processes of nature relate to the growing ethical conviction, entrenched in their cultural heritage, that just principles are rooted in reality.<sup>104</sup> This emphasis has no part in the presumption that nature is value-free.<sup>105</sup> Modern meta-ethics, by contrast, puts on a façade of just discourse while denying the very existence of a higher law.

To give an example from Pre-Socratic literature, Orestes, in Aeschylus's *Oresteia*, comes to the awareness of a more rational justice than cruel vindictiveness, a rule of law that seeks to harmonize rather than further inflame conflicting interests. In this conception, the rule of reason overcomes blind fate; "a 'court set up in perpetuity' in the heavens"<sup>106</sup> ultimately assures such justice. This movement towards a more virtuous conception of higher law and an eternal, celestial Court gives hope for eventual justice in spite of present injustices.

Sophocles puts these words in heroine Antigone's mouth that appeal to a higher law than the king's orders. These words respond to the question of whether she flatly chose to disobey. She exclaims:

Naturally! Since Zeus never promulgated  
Such a law. Nor will you find  
That Justice publishes such laws to man below.  
I never thought your edicts had such force  
They nullified the laws of heaven, which,

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<sup>103</sup> See Gregory Vlastos, *Equality and Justice in Early Greek Cosmologies*, 42 *Classical Philosophy* 156-78 (1947).

<sup>104</sup> See TERENCE IRWIN, *CLASSICAL THOUGHT* (Oxford Univ. Press, 1989).

<sup>105</sup> See WERNER JAEGER, *PAIDEIA* (1939); TERENCE IRWIN, *CLASSICAL THOUGHT* (1989).

<sup>106</sup> RICHARD KUHN, *THE HOUSE, THE CITY AND THE JUDGE: THE GROWTH OF MORAL AWARENESS IN THE ORESTEIA* (1962).

Unwritten, not proclaimed, can boast  
A currency that everlastingly is valid;  
An origin beyond the birth of man.  
And I, whom no man's frown can frighten,  
Am far from risking Heaven's favor by flouting these.<sup>107</sup>

This lyric expression of the higher, heavenly law speaks to its pre-historic origin, its eternal applicability and its binding position of ascendancy over even king-made law in a monarchy.

Along similar lines, Heraclitus wrote that human laws are nourished by one divine law that outlasts them all—the higher law.<sup>108</sup> Heraclitus seeks an enlargement of the rule of law beyond the city-state into a form of cosmic justice (as the poet Hesiod suggests).<sup>109</sup> Heraclitus also sees a harmony of opposites grounded in natural law (somewhat similar to the concept of *yin* and *yang* in some Asian philosophies), and calls it *Logos*.<sup>110</sup> At times, Heraclitus actually seems to identify *Logos* with the divine. A kind of cosmic justice, a moral ecology so to say, is thus rooted in the *Logos* Reality.<sup>111</sup> This truth is foundational to an international jurisprudence especially, but also to domestic ones.

The Sophists, on the other hand, put a position often held forth today: rhetoric shapes the appearance, which is what is perceived, which has no grounding in justice, higher law and virtue. Such a stance can lead to the position, attributed to Thrasymachus, that justice amounts to (crudely enough) the advantage of the more powerful, making it relative merely to whoever wields the power (a positivist position that antedates Hans

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<sup>107</sup> OEDIPUS PLAYS, *supra* note 61 at 179.

<sup>108</sup> See, e.g., J.M. ROBINSON, AN INTRODUCTION TO EARLY GREEK PHILOSOPHY (Houghton Mifflin, 1968); THE PRE-SOCRATICS (ed. Philip Wheelwright, Odyssey, 1966).

<sup>109</sup> See JONATHAN BARNES, THE PRE-SOCRATIC PHILOSOPHERS (Routledge and Kegan Paul, 1979).

<sup>110</sup> See 1 W.K.C. GUTHRIE, A HISTORY OF GREEK PHILOSOPHY 419-34 (Cambridge Univ. Press, 1962), for an elaboration on the notion of *Logos*.

<sup>111</sup> See, e.g., ROBINSON, *supra* note 107; THE PRE-SOCRATICS *supra* note 107.



Kelsen by many centuries).<sup>112</sup> No cosmology, no knowledge of a Divine Being, and no cosmic justice enter into this brutish<sup>113</sup> and potentially brutal position.<sup>114</sup> For if justice amounts only to the dictates of the powerful, oppression can, strangely enough, become "justice" according to Thrasymachus.

The Sophists present the specter of legal positivism and formalism that would preclude: "The Moment of Truth for a practicing attorney occurs whenever a prospective client tells a story that seems morally compelling but legally hopeless...Too much injustice persists in the world because tired legal thinking has accepted unjust patterns as inevitable."<sup>115</sup>

It fell then to the great Socrates to recall Athens to the quest for true knowledge and justice, rather than settling for the superficial appearances and conventions of the Sophist "spin-doctors." He thereby enabled Plato to readdress the deep conditions of the human soul, and in doing so to bring into focus the idea of a structure of justice in the universe and its transcendent Source, notions desperately needed in law, including international law, whether in the West or East.

### **An Account of Socrates:**

At the trial where his life hung in the balance, Socrates responded to the charge of corrupting the Athenian youth with these grand words:

I do nothing but go about persuading you all, old and young alike, not to take thought for your persons or your properties, but first and chiefly to care about the greatest improvement of the soul . . . I tell you that virtue is not given by money, but that from virtue comes money and every other good of man, public as well as private. This is my

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<sup>112</sup> REPUBLIC *supra* note 120.

<sup>113</sup> We would have the Hobbesian condition of "the life of man, solitary, [poor], nasty, brutish, and short" THOMAS HOBBES, LEVIATHAN 112 (New York, E.P. Dutton, Co., 1950).

<sup>114</sup> See THE PRE-SOCRATICS *supra* note 107 at 239-50.

<sup>115</sup> ANALYTIC JURISPRUDENCE ANTHOLOGY, *supra* note 5 at 289.

teaching, and if this is the doctrine that corrupts the youth, I am a mischievous person . . . I sought to persuade every man among you that he must look to himself and seek virtue and wisdom before he looks to his private interests<sup>116</sup> . . . The difficulty, my friends, is not to avoid death, but to avoid unrighteousness. And will life be worth living, if that higher part of man be destroyed, which is improved by justice and depraved by injustice?<sup>117</sup>

Socrates both describes and exemplifies a laudable life, one that surely rose to supranormal<sup>118</sup> proportions. Professor Anthony D'Amato wrote that "to Socrates, and presumably to the Athenian citizenry as a whole, judging from the evidence which exists, a trial and judgment was simply an attempt by the tribunal to apply 'the law,' an immutable concept which somehow had a separate, independent existence unchanged by specific cases."<sup>119</sup> Herein lies another statement of the higher law, which every epoch, including the 21st century, ought to follow. Here is a noble example of magnanimity in the face of manifest *injustice*.

Although Socrates himself faced an adverse (indeed life-threatening) situation, he believed that in the ultimate scheme of things, nothing ultimately detrimental could happen to the good person. Augustine expresses similar notions in works such as the magisterial *De Civitatis Dei*, which many consider his *magnum opus*.<sup>120</sup> While this sacrificial speech extolling justice and virtue was the crowning achievement of Socrates' life, it is also a fitting introduction to Socrates' student Plato and his contribution to this topic.

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<sup>116</sup> PLATO, APOLOGY 30, 36, 39 (trans. Jowett Random House 1937).

<sup>117</sup> See, e.g., *Id.* at 49; PLATO, PLATO'S CRITO 47 (ed. Gilbert P. Rose, 3d ed., 1983)(1980).

<sup>118</sup> At the very least in the statistical, social/psychological sense but more importantly in the sublime, moral sense. A chapter in the Sociological Perspective by Dr. Zondra Lindblade draws the distinctions between various variations of the term "normal" in her fine chapter of that book.

<sup>119</sup> ANALYTIC JURISPRUDENCE ANTHOLOGY, *supra* note 5, at 119, *quoted in* ANTHONY D'AMATO, OBLIGATION TO OBEY THE LAW: A STUDY OF THE DEATH OF SOCRATES 49 S. CAL. L. REV. 1079 (1976).

<sup>120</sup> *Passim*, AUGUSTINE, CITY OF GOD, (Trans. Marcus Dods, New York, Hafner, 1945).

**Plato:**

Many of Plato's dialogues concern the virtues, especially those like justice, wisdom, and prudence. Like many of the Asian philosophers, his political writings (*Republic*, *Statesman*, *Laws*) likewise address the improvement of the soul.<sup>121</sup>

The guardians in the *Republic*, were "to live together in the continual practice of virtue, which was to be their sole pursuit."<sup>122</sup> Do most politicians, attorneys, judges and other national leaders actually believe that "The art of politics has to do with the soul: what gymnastics and medicine are to the body, legislation and the administration of justice are to the soul."?<sup>123</sup> Thankfully, such statements are still contemplated by those who take seriously a jurisprudence of justice, higher law, and virtue. It hardly fits, however, the mold of a demagogue who runs roughshod over his own people.

Plato even criticized the renown Pericles, saying that Pericles should have sought "to implant justice in their souls and take away injustice, to implant temperance and take away intemperance, to implant virtue and take away every vice."<sup>124</sup> Plato's central thesis remains the same throughout: the most important task in this life is the improvement of the soul through virtue,<sup>125</sup> which fits with the higher law. It is not a mere, surface behaviorism. It is more akin to Yale Dean Harold Koh's notion of internalization.<sup>126</sup> Would that his central thesis find more widespread and profounder application in international law as well as domestic law!

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<sup>121</sup> PLATO, *LAWS* (trans. Thomas L. Pangle, New York, Basic Books, 1980); PLATO, *REPUBLIC* (ed. G.R.F. Ferrari, trans. Tom Griffith, 2000); PLATO, *STATESMAN* (ed. Julia Annas & Robin Waterfield, New York, Cambridge Univ. Press 1995).

<sup>122</sup> PLATO, *TIMAEUS* 18 (trans. Donald J. Zeyl, Indianapolis, Hackett Pub. Co., 2000).

<sup>123</sup> PLATO, *GORGAS* 464 (trans. Walter Hamilton, New York, Penguin Books, 1971).

<sup>124</sup> *Id* at 504, 513-14.

<sup>125</sup> *REPUBLIC* *supra* note 120 at 338-52.

<sup>126</sup> Koh, *supra* note 8.

The Sophists are akin to the public's perception of the legal profession and Plato roundly criticizes the Sophists' use of rhetoric as solely a way to win wealth or power, rather than to instill virtue.<sup>127</sup> Plato shows the problems with Thrasymachus's definition of justice as whatever benefits the stronger: it assumes that the strong really apprehend what is best, and thus, that they are wiser than the weak;<sup>128</sup> it moves towards anarchy if people are constantly and illegitimately vying with each other for power and dominance; it leads to ignoring justice and even defending injustice as the better way to life.<sup>129</sup> These criticisms actually apply to misguided relativism as applied to law and in general: it opens the door to ill conceived self-interest; it threatens what Thomas Hobbes subsequently referred to as “. . . [war] of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place [sic]”<sup>130</sup>; and furthermore, it can make no binding, just distinction between good and evil, just and unjust. If what Gandhi called soul force does not prevail, then other force—be it military, governmental and legal--often does.<sup>131</sup> International law generally depends more on its stake in justice and higher law than the march of troops to enforce their orders. It usually must win voluntary acceptance of its jurisdiction and good-faith compliance with its orders. Thus, justice, higher law and virtue gain greater significance in the international law context.

In the *Phaedrus*, Plato expresses concern about sophistical rhetoric<sup>132</sup> that seems hauntingly applicable to what passes as law and international law at times. According to

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<sup>127</sup> REPUBLIC *supra* note 120.

<sup>128</sup> *Id.*

<sup>129</sup> HOBBS, *supra* note 112 at 105.

<sup>130</sup> Dr. Samuel Ling, Asian History Lecture, (Spring 1996).

<sup>131</sup> HOBBS, *supra* note 112 at 105.

<sup>132</sup> PLATO, PHAEDRAS, in THE DIALOGUES OF PLATO 169-72, 177-79 (trans. B. Jowett, M.A., 4<sup>th</sup> ed., London, Oxford Univ. Press, 1953)(1871).

this view, the orator need only understand the beliefs of his judges, who judge him on the art of persuasion, not on the truth of the matter.<sup>133</sup> The orator can extol evil as being good, and might persuade the public as well to do evil instead of good.<sup>134</sup> He influences their souls, but without true knowledge.<sup>135</sup> To what end does he sway others—merely self-interested ones? Such criticisms must be taken seriously if legal and political discourse is to rise above sophistry. This position does not, however, exclude prudential uses of rhetorical (yet honest) tools harnessed to just causes in accordance with higher law and justice: there exists an important distinction between these two positions.

When distilled down, the one of the issues is between opinion and knowledge (which must be true by proper definition), between appearance and reality. When Protagoras expresses the opinion that “man is the measure of all things,” he, if logically pushed to its limits, affirms all opinions, including the opinion that his own opinion is false.<sup>136</sup> So even Protagoras must admit that at least one opinion is wiser and truer than another; but this deduction makes the wiser ones into the measure of things, not ‘man’ in general, and not unequivocally everyone. Manifestly then, not all opinions are equally valuable, wise or worthwhile.<sup>137</sup> So there must be some anchor of virtue (such as the related set of honesty, veracity and integrity as contrasted by the contrasting set of mendaciousness, duplicity and falseness), justice and higher law by which to ground such statements.

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<sup>133</sup> PHAEDRAS *supra* note 131.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> PLATO, THEAETETUS in THE DIALOGUES OF PLATO 268-9, 288-290, 304-306, 308 (trans. B. Jowett, M.A., 4<sup>th</sup> ed., London, Oxford Univ. Press, 1953)(1871).

<sup>137</sup> *Id.*

The relativist is deceived into thinking that because the world is continually changing in its temporal particularities, that justice, virtue and higher law also mutate. If so, then everything is in a process of becoming: unchanging “being” (permanent, essential ontologies) are then abolished. But because appearances and temporal contingencies change, it does not lead one ineluctably to conclude that the underlying *reality* changes too.

Plato’s famous cave analogy speaks to this point.<sup>138</sup> The Sophist relativist is like a prisoner who, suffering from a form of amnesia and confined to a world of flitting shadows, supposes these appearances to be all the reality there is.<sup>139</sup> If he would think, if he could look behind himself, if he could exit the cave, he would know very differently.<sup>140</sup> That is why the Sophist fails: his rhetoric is not liberated by knowledge of the truth, but a slave to opinions based on appearances, the convenience of expedience, temporal contingencies, prestige, or other factors that vary from place to place and from one individual to another.<sup>141</sup> Sophistical resistance to justice, other virtues and higher law fails; this statement holds for all sophistical opinions—whether by judicial, legislative or executive branches.

Sheer pragmatism or formalism is not enough. Justice & injustice are not changing expedients for changing circumstances; they are rooted in a changeless reality indiscernible by the physical senses alone. So then it is not Socrates but the Sophists who impoverished the souls of Athenian youth by failing to extol justice, higher law and virtue.

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<sup>138</sup> THEAETETUS *supra* note 135.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

The *Timaeus* talks about how God set things in order and constructed the cosmos by giving to all things proportion, measure, and harmony.<sup>142</sup> According to Plato, this cosmic harmony should extend to the law-governed city where justice means the harmony of right (just) relationships and proportionate treatment, and also to the good life ruled wisely by the virtue graced soul.<sup>143</sup> As musical harmony depends on mathematical relationships between notes, so human life must be properly ordered if it is not to end in painful discord, dissolution or even death. Indeed Plato declares, “The harmony of the soul is virtue.”<sup>144</sup> So the discussion again centers on virtue. Even modicums of virtue can help prevent some of the tragedies that legal systems repeatedly endure.

Plato calls for in the *Republic*, rule by wise, philosopher-kings rigorously educated to disciplined habits aimed at true understanding and continual pursuit of the good.<sup>145</sup> Such people can help add to the stature of legal systems and the profession.

Plato’s theory of forms as unchanging, transcendent ideals<sup>146</sup> becomes relevant here. Reason<sup>147</sup> does not develop mere opinions about justice and then apply them in governing the appetites.<sup>148</sup> The mind does not fabricate virtues, but rather it discovers what is objectively and inherently good.<sup>149</sup> The goal is to attain to what justice, virtue and higher law really are, rather than how they appear to a Thrasymachus or to any other person necessarily (although correspondence between a person’s perception and objective

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<sup>142</sup> *TIMAEUS*, *supra* note 121.

<sup>143</sup> *Id.*

<sup>144</sup> *LAWS* *supra* note 120 at 653.

<sup>145</sup> *REPUBLIC*, *supra* note 120.

<sup>146</sup> *Id.*

<sup>147</sup> The use of the term "reason" is in the broader, classical sense that includes virtue and a healthy conscience along with rationality and logic.

<sup>148</sup> *REPUBLIC*, *supra* note 120.

<sup>149</sup> *Id.*

reality is possible and indeed, sought). So there exists an objective rooting in real justice, virtue and higher law, and a just legal system, by definition, depends on these realities.<sup>150</sup>

In the *Laws*, Plato proposes the model of a law-governed community in which the people themselves value the good.<sup>151</sup> The virtues take precedence over other goods such as wealth or beauty.<sup>152</sup> Education is geared accordingly and should lead the soul “to hate what you ought to hate and love what you ought to love from the beginning of life to the end.”<sup>153</sup> Indeed, a person’s whole energies throughout life should be devoted to the development of virtue: for Plato concludes that ultimately, it is not mere mortals but God who ought to be the measure of all things.<sup>154</sup>

It is important to note that Plato’s conception of knowledge is not just a matter of knowledge as against ignorance or opinion, nor just an ability to define or describe a virtue.<sup>155</sup> Discernment between good and evil is required, along with the practiced capacity for making sound judgments that recognize goodness when exemplified in particular cases.<sup>156</sup> Furthermore, it is not a detached, unemotional kind of thinking, but is filled with wonder at and a deep devotion to the good.<sup>157</sup> Such a framework exercises virtue, pursues justice and comports with higher law.

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<sup>150</sup> Many centuries later, scholars such as Aquinas and others built on this foundation. *See, e.g.* THOMAS AQUINAS, TREATISE ON LAW (1981)(1947).

<sup>151</sup> *LAWS*, *supra* note 120.

<sup>152</sup> *Id.*

<sup>153</sup> THE PRE-SOCRATICS *supra* note 107. Presumably, one should not extend hate towards people but to that which contravenes justice. Hating injustice because of loving [Greek: *agape*] people against whom the injustice is wrought deserves the label virtue. At the same time, that hate should not extend even to the perpetrator of the injustice.

<sup>154</sup> *See Id* at 653,717,770.

<sup>155</sup> *See* JOHN GOULD, THE DEVELOPMENT OF PLATO'S ETHICS (Russell & Russell, 1955).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*



Plato employs the analogy of a lover absorbed day and night with his beloved, or rather, with the ideals that the beloved exemplifies.<sup>158</sup> So then according to Plato, our calling in the legal and governmental spheres and in life then, is to romance and be romanced by justice, higher law and virtue.

The *Phaedrus* likens the soul to a charioteer with two winged horses, one wanton and wild, the other spirited but controllable, soaring towards the sun in all its majesty.<sup>159</sup> As long as the wanton horse is uncontrolled there can be no united effort, and both horse and charioteers plunge down to the earth again and again.<sup>160</sup> But if the driver guides the spirited horse while giving it the lead, then its strength will control the wanton so that they will pull together and soar to the heavens.<sup>161</sup> Plato speaks of the higher aspects of humans harnessing the appetitive/animal side.<sup>162</sup> The brute inside must be disciplined to soar to the heavens.<sup>163</sup> Otherwise, the host of horrors that parade through this world will march on.

Plato, as an encapsulation, states: "Wherefore we ought to fly away from earth and heaven as quickly as we can; and to fly away is to become like God, as far as this is possible; and to become like him is to become holy, just, and wise."<sup>164</sup> In other words it is an exhortation towards a just and virtuous life under the highest possible law. This view has become all too rare as Western Civilization has reached what Harvard Professor Emeritus Harold Berman calls the "twilight of transcendence."<sup>165</sup>

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<sup>158</sup> GOULD *supra* note 154.

<sup>159</sup> PHAEDRAS *supra* note 131.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> THEAETETUS *supra* note 135.

<sup>165</sup> See the magisterial work of Harvard Law School Professor Emeritus HAROLD BERMAN, *LAW AND REVOLUTION* (1983).

Plato continues this same theme in the *Laws*: “he who would be dear to God must, as far as is possible, be like him and such as he is.”<sup>166</sup> Several motifs emerge from these writings: First, this entire metaphysical discussion grounds itself in unchanging and transcendent Fact and Reality—in virtue, justice and higher law. In this sense, law is a fact.<sup>167</sup> Second, Plato’s forms theory introduced a theory of universals with unchanging natures that dominated the jurisprudence of most of the history of Western Civilization and continues to this day. This is the best foundational theory for international law and law in general.

The *Statesman* likens God to a statesman shepherding his people, but it is in the *Laws* that Plato offers his last and most detailed account.<sup>168</sup> Plato describes God as powerful, purposeful, intelligent, and good in an outgoing way: everything he designs is directed towards the overall goodness of the universe.<sup>169</sup> Individual virtue and the just city-state are supposed to be parts of this cosmic harmony, and because they imitate God’s goodness, they are as microcosms of the whole.<sup>170</sup> Each legal system, whether international or domestic, can aspire to such lofty objectives.

The chief purpose of the *Timaeus* seems to be to link justice to the structure of the cosmos—higher law.<sup>171</sup> This higher law grounds itself in reality, in the forms, in the nature of the soul, in cosmic harmony, in the idea of the good, in God. No better theoretical framework exists.

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<sup>166</sup> LAWS, *supra* note 120 at 716. See CUTBERT G. RUTENBAR, THE DOCTRINE OF THE IMITATION OF GOD IN PLATO (New York, King’s Crown Press, 1946) (1909).

<sup>167</sup> See Anthony D’Amato’s treatment in Anthony D’Amato, *On the Connection Between Law and Justice*, 26 U. C. DAVIS L. REV. 527 (1993).

<sup>168</sup> See, e.g., LAWS *supra* note 120 at 894-903; STATESMAN *supra* note 120 at 269-75

<sup>169</sup> See, e.g., LAWS *supra* note 120.

<sup>170</sup> *Id.*

<sup>171</sup> TIMAEUS *supra* note 121.

As a contrast to secularized individualism, skepticism and relativism that prevails in this legal culture, Plato tells us: “The ruler of the universe has ordered all things with a view to the excellence and preservation of the whole, and each part, as far as may be, has an action and passion appropriate to it...one of these portions of the universe is thine own, unhappy man, which, however little, contributes to the whole, and in order that the life of the whole may be blessed; and that you are created for the sake of the whole, and not the whole for the sake of you.”<sup>172</sup> Hence, Plato thinks the good is ultimately found in a more wholistic and community context, and ultimately, in the mind of God. If law does not contribute in this way, it loses an important portion of its *raison d’etre*.

In their thinking about the cosmos, the early Greek philosophers struggled to distinguish between appearances and reality. Plato and Aristotle extended this concern into the metaphysical domain where what appears to some to be the good may not in reality be so.<sup>173</sup> Pleasure, wealth, power, or success may be sought after because to their devotees they appear to be the highest ends, but in reality they are not. This confusion between appearance and reality in ethics underlies the contest between two dominant images of human life that Alasdair MacIntyre finds in a post-Homeric reflection, a life aiming at virtue or excellence (*arete*) and a life aiming at superficial “success” or power.<sup>174</sup> Every branch of government would do well to pursue the former rather than the latter.

The former image of virtue/excellence (*arete*) is found in Plato and Aristotle, the latter (superficial success/power) in Aristotle’s one-time student (interestingly enough),

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<sup>172</sup> LAWS *supra* note 120 at 903.

<sup>173</sup> *Id.*

<sup>174</sup> ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 88 (1988).

Alexander the Great.<sup>175</sup> Neither power nor success, nor pleasure, nor wealth is in reality the *highest* good, even though to some people they appear so. It is not denying that they are goods in their proper places when attached as means in the service of virtuous ends.

Socrates, Plato and Aristotle concerned themselves with the improvement of the soul and developed an ethic of virtue grounded in the ordered nature of reality as a whole.<sup>176</sup> Those in or influential to legal systems would be well advised to follow such an approach rather than making positivistic or formalistic excuses for injustice, vice or violations of higher law. To Plato's student Aristotle we turn next for further grounding in justice, higher law and virtue, the best basis for international law particularly but also law as whole.

### **Aristotle: Justice, Telos, Virtue and the Higher Life through Higher Law**

Aristotle merges the notion of justice with virtue by crowning justice as the apogee of virtue in relation to others:

Justice then in this sense is perfect Virtue, though with a qualification, namely that it is displayed towards others. This is why Justice is often thought to be the chief of the virtues, and more sublime 'than the evening or the morning star'; and we have the proverb—

In Justice is all Virtue found in sum.

And Justice is perfect virtue because it is the practice of perfect virtue; and perfect in a special degree, because its possessor can practice his virtue towards others and not merely by himself; for there are many who can practice virtue in their own private affairs but cannot do so in their relations with another. This is why we approve the saying of Bias, 'Office will show a man'; for in office one is brought into relation with others and becomes a member of a community.

The same reason, namely that it involves relationship with someone else, accounts for the view that Justice alone of the virtues is 'the good of others,' because it does what is for the advantage of another, either a ruler or an associate. As then the worst man is he who practices vice towards his friends as well as in regard to himself, so the best is not he who practices virtue in regard to himself but he who practices it towards others; for that is a difficult task . . .<sup>177</sup>

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<sup>175</sup> WHOSE JUSTICE? WHICH RATIONALITY? *supra* note 173.

<sup>176</sup> See Finnis *supra* note 5 at Ch. XIII, which analyzes and synthesizes important strands of thought of these foremost of Hellenic thinkers.

<sup>177</sup> ARISTOTLE, NICOMACHEAN ETHICS (trans. Martin Oswald, Macmillan, 1986).

Aristotle does not stop with justice as perfect virtue in human relationships alone. In addition, there are hints of the relation between human virtue, higher law, justice and the divine.<sup>178</sup> Being is not morally neutral; in fact, the world of particulars is laden with issues of justice through and through,<sup>179</sup> including matters in the international law domain as well as domestic law spheres.

Aristotle states: "If God is always in that good state in which we sometimes are, this compels our wonder: and if in a better state this compels it yet more. And God *is* in a better state. And life belongs to God; for the actuality of thought is life, and God is that actuality... We say therefore that God is a living being, eternal, most good, so that life and duration continuous and eternal belong to God;"<sup>180</sup>

The just and virtuous--the human *telos*<sup>181</sup>--is the full development of all this potential.<sup>182</sup> This is our highest good. It is *eudaimonia*, usually translated "happiness" but actually closer to "well-being," although "well" simply reiterates "good" ("being" itself being good). Aristotle elaborates: the human good is the activity of the soul in accordance with virtue (*arete*).<sup>183</sup> Such activity never violates and always harmonizes with higher law.

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<sup>178</sup> NICOMACHEAN ETHICS *supra* note 176.

<sup>179</sup> *Id.*

<sup>180</sup> ARISTOTLE, METAPHYSICS 994b.12 (Trans. Hippocrates G. Apostle, Indiana Univ. Press, 1966).; *See also* XII. 6-7; ARISTOTLE, PHYSICS, VIII (Trans. Robin Waterfield, 1996).

<sup>181</sup> Greek for "end" or "purpose". "God and nature," writes Aristotle, "create nothing that has not its use" ARISTOTLE, ON THE HEAVENS, 271A.33 (trans. W.K.C. Guthrie, Cambridge, Harv. Univ. Press, 1945); "Nature never makes anything without a purpose" ARISTOTLE, ON THE SOUL, 432b.21 (Cambridge, Harv. Univ. Press, 2000) (1957).

<sup>182</sup> *Dunamis* in the Greek.

<sup>183</sup> NICOMACHEAN ETHICS *supra* note 176 at I.4; *See also* JOHN COOPER, REASON AND THE HUMAN GOOD IN ARISTOTLE ch. 1 (1975).

Moral virtues are the excellence of the appetitive life, whereas intellectual virtues indicate excellence in the life of the mind.<sup>184</sup> Such human flourishing is compromised, according to Aristotle, in those who live for pleasure, wealth or honor, for other animals have such appetites too; only humans have the power to reason (broadly defined, including the healthy functioning of the conscience) and so to guide those appetites.<sup>185</sup> The human *telos* does not exclude pleasure or other such satisfactions: indeed, achieving the good brings its own pleasure.<sup>186</sup> No other species have courts, legislatures, or executive branches—or the deliberative processes found in legal, political, and academic discussions.

Actualizing such a life is a developmental process: the Maker grants the capacity, but to develop it requires just habits, and just habits require just choices repeatedly made and reinforced until they become second nature.<sup>187</sup> Just choices in turn must be determined by practical reason deliberating about what accords with higher law. The various appetites, as well as pleasure and pain in general, may be felt both too much and too little, and neither side of the spectrum from the balanced center is good.<sup>188</sup> But to feel them, at the right times, with reference to the right objects, towards the right people, with the right motive and in the just way, mediates between these extremes and characterizes virtue.<sup>189</sup> Herein we find Aristotle's famous Golden Mean between extremes.<sup>190</sup>

So what are the implications for jurisprudence, the state and for laws? The “best kind of state exists not just to provide external goods but for the good of the soul—in

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<sup>184</sup> METAPHYSICS *supra* note 179.

<sup>185</sup> NICOMACHEAN ETHICS *supra* note 176 at 1099a.31-1099b.8.

<sup>186</sup> *Id.*

<sup>187</sup> NICOMACHEAN ETHICS *supra* note 176 at 1099a.31-1099b.8.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

effect, to make men good...the state therefore inculcates right habits by means of just laws."<sup>191</sup> Aristotle also states "for the administration of the law means the discrimination of what is just and what is unjust."<sup>192</sup> This venerable sage continues: "This is why we do not permit a man to rule but the law, because a man rules in his own interest, and becomes a tyrant; but the function of a ruler is to be the guardian of justice, and if of justice, then of equality."<sup>193</sup> All in society, especially those distinctly responsible as leaders of the legal and political realms, should help further such ends that abide by the rule of law, nourished by higher law through justice.

Henry Veatch, an Aristotle scholar, tells us that the most important end of knowledge is not knowledge of humankind, because humans are not the most important entities in the universe.<sup>194</sup> So according to Aristotle, the very nature of our being points us beyond ourselves: humans are not the measure of all things, for only God is perfectly good.<sup>195</sup> In reality, the human *telos*, our highest end, is God.<sup>196</sup> Pursuing justice, virtue and higher law created by the Uncreated<sup>197</sup> then justly becomes the virtuous pursuit of every state and every legal system, most vividly in the international sphere, but also in domestic realms.

## **Conclusion**

In any legal system, but most notably in international legal systems, this foundation of higher law, virtue and justice alone will sustain long-term flourishing and

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<sup>191</sup> ARISTOTLE, *POLITICS*, I.1-2, VII.1-3 (Cambridge Univ. Press, 1988).

<sup>192</sup> NICOMACHEAN ETHICS, *supra* note 176.

<sup>193</sup> *Id.*

<sup>194</sup> HENRY VEATCH, *ARISTOTLE: A CONTEMPORARY APPRECIATION* (1974).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> As Dostoevsky indicated, if God is dead, then everything is permissible *see* FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* (ed. Ralph E. Matlaw, trans. Garnett, 1976). *See also*, FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* (trans. Constance Garnett, 1938).

fulfillment, both individually and societally. It points the way towards progress and needed reform of positive law. The accumulated weight of wise words over the centuries from both the East and the West<sup>198</sup> exhort us in this direction. It is a safeguard against such monstrosities as Nazi, Maoist and Stalinist oppression, and a beacon to light the way into the future of our global village.

The words of the great 20<sup>th</sup> century Princeton professor emeritus and jurisprudential scholar Edwin Corwin provides a fitting finale to this essay:

*There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands. . . . They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.”*<sup>199</sup> [italics part of the original text as quoted]

Thus, the pronouncements of every legal system, international especially but also domestic, the judgments of every court, the formulations of every legislature, the decisions of every executive, should discover,<sup>200</sup> declare and follow accordingly: it would result in greater worthiness to lead and greater legitimacy for people to follow. Herein lay the seeds of progress<sup>201</sup> and reform.

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<sup>198</sup> See Finnis, *supra* note 5 at ch. XIII where he deftly handles profound thoughts from Plato, Aristotle and Aquinas.

<sup>199</sup> EDWARD S. CORWIN, *supra* note 7, at 4-5.

<sup>200</sup> “In contrast, natural lawyers claim that morality is not so much to be defined as to be discovered; reality is not created but apprehended” FORTE *supra* note 15 at 8.

<sup>201</sup> While rejecting the notion of automatic, inexorable “progress”, the use here nonetheless promises progress to the extent justice, higher law, and virtue are embraced.